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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

STATE OF ARIZONA, Plaintiff, vs. JOSEPH DOUGLAS ROBERTS, Defendant.	CR 2010-00047 STATE'S MEMORANDUM RE HEARING ON MOTION TO REMAND (Honorable Donna J. Grimsley)

The State of Arizona, by undersigned counsel and in accordance with Court order, submits this Memorandum regarding the impending hearing on the Defendant's Motion to Dismiss. At the most recent hearing (September 27, 2010), the Court set an evidentiary hearing to provide facts for what was loosely being called a *Warner* ruling (State v. Warner, 150 Ariz. 123, 722 P.2d 291 (1986)); that evidentiary hearing is set for November 10, 2010.

The facts regarding the conduct of the two investigators from the County Attorney's office are largely not in dispute. Their encounter with the defendant was recorded. The issue appears to revolve more around whether the facts, as they are, constitute a violation of the

attorney-client relationship. If they do constitute a violation, which the State does not concede, then the issue evolves into the extent of the violation, which will lead to what remedy, if any, is appropriate.

The State incorporates by reference its earlier Responses regarding the Motion to Remand and the Motion to Dismiss.

Submitted November ____, 2010.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

By _____
John F. Beatty
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MEMORANDUM OF POINTS AND AUTHORITIES

A. FACTUAL BACKGROUND

As the Court is aware, this case involves allegations regarding the deaths of two individuals: William McCarraghe and Daniel Achten. The defendant has been charged with participating in, or assisting in the aftermath of, those murders.

After the complaint against the defendant was filed, a preliminary hearing was scheduled. The hearing eventually started on February 5, 2010. On February 4, 2010, two investigators employed by the Apache County Attorneys' Office met with and spoke to the defendant in the jail without the knowledge or consent of his attorney.

The meeting with the defendant at the jail lasted approximately 10 minutes. The meeting was recorded. A transcript of that recording was included in the State's response to the motion to dismiss, which was filed on September 3, 2010.

At the beginning of the meeting, the investigators advised the defendant of his *Miranda*

rights, which he acknowledged. The investigators explained to the defendant the parameters of the plea agreement, making sure he understood what was at stake before the preliminary hearing scheduled for the next day.

The investigators did not ask about what his attorney had said or done. They did not ask about any conversations between the defendant and his lawyer. The defendant said virtually nothing, including the important fact that he did not ask about his lawyer at all. Any statements by the investigators regarding the defendant's lawyer had to do with the defendant's ability to contact his lawyer and whether he wanted to do so. There was no attempt to interfere with the relationship between the defendant and his lawyer; quite to the contrary, the investigators encouraged or at least suggested that he could have contact with his lawyer. The investigators did not ask about the defenses or defense witnesses or defense strategies, and the defendant did not say anything in that regard. The investigators obviously did not intimidate the defendant (he did not try to fire his attorney or enter into the plea agreement), they never extracted or tried to extract a confession, and they didn't discuss any other investigation.

B. DEFENDANT'S CONTENTION

The defense contends that this meeting acted to deny the defendant his rights, but he points to absolutely nothing that shows any kind of violation; indeed, there is none. The defense has not presented a prima facie case of violation of rights, let alone made a showing of prejudice, and therefore the Motion to Dismiss, and this "*Warner*" hearing, are unwarranted.

Rule 16, Arizona Rules of Criminal Procedure, regarding suppression motions, requires the defendant to bear the burden of establishing a prima facie case before the State must prove by a preponderance that the actions were legal. Rule 16.2(b), Ariz.R.Crim.Proc.

Further, in *State v. Mieg*, ___ P3d ___, 2010 WL 3910171 (Ariz.App. 2010), the

Appellate Court just recently reversed a trial court's dismissal because the defendant's claim of vindictiveness did not meet the standard of a prima facie case. While in that case the facts revolved around a charging decision, where here the facts revolve around talking to a represented defendant, the concept is the same: the prosecutor was accused of misconduct (vindictiveness in *Mieg*, or intrusion into attorney-client relationship in the case at bar) which the defense claimed to require dismissal. In *Mieg*, the defendant's claim did not rise to the level even of a prima facie case and therefore the dismissal was wholly inappropriate. In the case at bar, the defense has not made a prima facie case and therefore the Motion to Dismiss needs to be denied without further argument.

C. LEGAL ARGUMENT

In *Warner*, the Court summarized its reasoning in the final paragraph of the opinion. In that summary, the Court instructed the trial court to make factual findings regarding several issues; it appears these instructions are what the defense in the case at bar calls the *Warner* test: 1) the State's motive behind the seizure of defendant's papers from his jail cell, which included transcripts of attorney-client meeting, 2) the State's use of those papers, 3) whether the interference was deliberate, 4) whether the State benefitted from the seizure, 5) if the seized information was used in trial, how any taint was purged, and 6) whether the defendant was, in fact, prejudiced. *Warner*, 150 Ariz. at 129, 722 P.2d 297.

The hearing scheduled for November 10 appears to be set to answer similar questions in the case at bar

1. State v. Warner, 150 Ariz. 123, 722 P.2d 291 (1986)

The facts in the case at bar show that the *Warner* case is not applicable. The prosecutor in *Warner* had privileged communications in his possession. In the case at bar, no such

communications were sought or received. Here, the defendant did not make any incriminatory statements, but rather listened to what the investigators had to say; there were no statements that might need to be suppressed. There was no attempt to interfere with the attorney-client privilege at all.

Reliance on *Warner*, a 1986 case, is also misplaced because there has been a change in the law regarding interviewing charged defendants, with appointed counsel, under these circumstances, where the defendant had not invoked his right to counsel under *Miranda* or *Edwards* but who did waive his right to have his attorney present. *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009).

2. *U.S. v. Morrison*, 449 U.S. 361, 101 S.Ct. 665 (1981)

In this case, which was the supporting case for State v. Warner, the Court discussed appropriate remedies. The Court found that dismissal was not appropriate without a showing of prejudice. In the case at bar, there has been no showing of prejudice, so dismissal would be unjustified.

3. *U.S. v. Davis*, 646 F.2d 1298 (C.A.Mo., 1981)

In this case, the State's agent spoke on several occasions with the defendant after the defendant had been arrested and appointed an attorney. Included in those conversations were threats by the State's agent. The defense alleged that this was a violation of his 6th Amendment rights. The trial court disagreed, as did the appellate court: "We ... hold that Agent Zambo's conduct was an intrusion on Mr. Davis' privacy rights but no sixth amendment violation existed because no incriminating information was gleaned from Zambo's contacts with Mr. Davis." *U.S. v. Davis*, 646 F.3d at 1302.

The Court went on to say:

> [9] While on hindsight we earnestly disapprove of the government agent's conduct, we are compelled to agree with those who previously reviewed this case that the encounter was not sufficient to constitute a sixth amendment violation.
> The Eighth Circuit, in Mastrain v. McManus, 554 F.2d 813, 821 (8th Cir.), cert. denied, 433 U.S. 913, 97 S.Ct. 2985, 53 L.Ed.2d 1099 (1977), enunciated, as a test for sixth amendment violations of the right to assistance of counsel, that in addition to the intrusion on the attorney-client relationship there must exist a nexus between the intrusion and some benefit to the prosecution. No nexus was shown in the present case. Appellants concede that no evidence helpful to the prosecution was obtained from Agent Zambo's contact with them. Cf. United States v. Levy, 557 F.2d 200 (3rd Cir. 1978) (DEA informer sat in on a meeting between the defendant and his counsel disclosing defense strategy to the prosecuting officers). In light of the other evidence legitimately obtained by the government and the cumulative nature of that evidence, the unauthorized communication between the government and appellants did not violate the sixth amendment.

Davis, 646 F.3d at 1303.

In the case at bar, no incriminating information was gleaned from the investigator's single contact with the defendant on February 4, 2010.

4. *Curtis v. Duval*, 124 F.3d 1 (C.A.1 (Mass.), 1997)

In this case, the judge made a decision during jury deliberations regarding instructing the jury on a certain issue without the defendant's attorney being present. The Appellate Court found that there is a difference between a "wholesale denial of counsel" versus a "short-term, localized denial of counsel." *Curtis v. Duval*, 124 F.3d at 6. The Court went on to say that relief was not available in that case because there was no substantial or injurious effect, making the error harmless. Ibid.

In the case at bar, the questioned contact was on one occasion and was less than 10 minutes long, making the contact short-term, localized and insubstantial. Further, there was no injury to the defendant.

5. *People v. Viray*, 134 Cal.App.4th 1186, 36 Cal.Rptr.3d 693 (Cal.App. 6 Dist., 2005)

In this case, the prosecutor directly spoke to and interrogated the defendant on the day of

her arraignment. The court reasoned that: "We are prepared to accept arguendo that the prosecutor's knowing interrogation of defendant after charging her with a felony may have constituted a species of misconduct. However we are not prepared to hold on this record that it was so egregious as to warrant dismissal." *Viray*, 134 Cal.App.4th at 1211.

In the case at bar, while the Court may find the conduct of the investigators to be a "species of misconduct," the level of that alleged misconduct certainly does not mandate dismissal. The meeting on February 4, 2010, did not substantially impact the preliminary hearing. The defendant did not try to fire his attorney. The Court did not appoint a new attorney. The defendant did not enter into any plea. Further, during the preliminary hearing defense counsel was able to bring out many viable but ultimately insufficient arguments, both during *voir dire* and cross of the witnesses, as well as during legal argument. Also, the defense counsel was able to make an offer of proof regarding particular witnesses. Despite the activities of February 4, the defendant enjoyed the fruits of an unimpeded relationship with his attorney.

There has been no prejudice to the defendant whatsoever.

6. *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009)

This case was discussed in earlier pleadings, finding that the mere fact that the defendant is represented by counsel is not sufficient to make a presumption of an invalid interrogation, let alone mandating dismissal of the charges.

D. CONCLUSION

The defendant has made no prima facie showing of there being a violation of the attorney-client relationship. Further, the 8-10 minutes contact on February 4, 2010, was short-term, localized, non-intrusive, and non-informative. There simply was no tampering with the attorney-client relationship. Even if there were, there is no showing of prejudice, small or otherwise. The defendant kept his attorney and did not take a plea. He did not divulge any

secrets, and he did not even ask for the whereabouts of his attorney.

The defendant comes before the Court now asking for relief when none is warranted. The most appropriate remedy in this case, if any, is the suppression of the information gathered on February 4, 2010. However, the defendant well-knows that suppression, while acceptable to the State, would have no bearing because there effectively is nothing to suppress. Because of this, he asks the Court to punish the State, and thereby the victims, in the most extreme way.

If punishment for misconduct is necessitated, the proper punishment is through the State Bar, not by dismissing the Indictment.

The Motion to Dismiss has no merit and should be denied.

Submitted November ____, 2010.

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